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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 ALTERNATIVE COMMUNITY HEALTH
12 CARE COOPERATIVE, INC. *et al.*,

13 Plaintiffs,

14 vs.

15 ERIC HOLDER, Attorney General of the
16 United States *et al.*,

17 Defendants.

CASE NO. 11cv2585-DMS (BGS)

**ORDER DENYING
APPLICATION FOR A
TEMPORARY RESTRAINING
ORDER AND NOTICE OF
HEARING**

18 Plaintiffs in this civil rights action filed an application for a temporary restraining order, seeking
19 to enjoin the prosecution of cooperatives operating marijuana dispensaries under California law and
20 landlords leasing real property to such cooperatives. Defendants opposed the motion and Plaintiffs
21 replied. For the reasons which follow, Plaintiffs' application for a temporary restraining order is
22 **DENIED.**

23 California's Compassionate Use Act, Cal. Health & Safety Code § 11362.5, "was designed to
24 ensure that seriously ill residents of the State have access to marijuana for medical purposes, and to
25 encourage Federal and State Governments to take steps toward ensuring the safe and affordable
26 distribution of the drug to patients in need. The Act creates an exemption from criminal prosecution
27 for physicians, as well as for patients and primary caregivers who possess or cultivate marijuana for
28 medicinal purposes with the recommendation or approval of a physician." *Gonzales v. Raich*, 545 U.S.
1, 5-6 (2005) (footnotes omitted) ("*Raich I*").

1 The federal Controlled Substances Act, 21 U.S.C. § 801 *et seq.* (“CSA”), is “a
2 closed regulatory system making it unlawful to manufacture, distribute, dispense, or possess any
3 controlled substance except in a manner authorized by the CSA.” *Raich I*, 545 U.S. at 13. It is “a
4 comprehensive framework for regulating the production, distribution, and possession of five classes of
5 ‘controlled substances.’” *Id.* at 24. Marijuana is classified as a Schedule I drug, 21 U.S.C. § 812(c),
6 which makes its “manufacture, distribution, or possession . . . a criminal offense, with the sole exception
7 being use of the drug as part of a Food and Drug Administration preapproved research study.” *Raich*
8 *I*, 545 U.S. at 14. “Schedule I drugs are categorized as such because of their high potential for abuse,
9 lack of any accepted medical use, and absence of any accepted safety for use in medically supervised
10 treatment. *Id.*, citing 21 U.S.C. § 812(b)(1). This reflects a determination by Congress in passing the
11 CSA “that marijuana has no medical benefits worthy of an exception (outside the confines of a
12 Government-approved research project). Whereas some other drugs can be dispensed and prescribed
13 for medical use, *see* 21 U.S.C. § 829, the same is not true for marijuana. Indeed, for purposes of the
14 Controlled Substances Act, marijuana has ‘no currently accepted medical use’ at all. § 812.” *United*
15 *States v. Oakland Cannabis Buyers’ Cooperative*, 532 U.S. 483, 491 (2001). “Despite considerable
16 efforts to reschedule marijuana, it remains a Schedule I drug.” *Raich I*, 545 U.S. at 15 (footnote
17 omitted).

18 Plaintiffs are two patients and four medical marijuana cooperatives who operate marijuana
19 dispensaries under the Act. Starting October 5, 2011, the United States Attorney for the Southern
20 District of California sent letters to two of the dispensary Plaintiffs and the landlords of the remaining
21 two dispensary Plaintiffs, formally notifying them “that the marijuana dispensary’s operations violate
22 United States law and that the violations of federal law relating to the marijuana dispensary’s operations
23 may result in criminal prosecution, imprisonment, fines, and the forfeiture of the proceeds of the
24 operations, as well as the real and personal property used to facilitate the operations.” (Compl. Exs. 1 -
25 4.) The letters give the recipients 45 days to “discontinue sale and/or distribution” at the referenced
26 locations or face the prospect of prosecution and forfeiture of assets. Plaintiffs seek a temporary
27 restraining order enjoining Defendants from prosecuting the dispensaries and their landlords as stated
28 in the letters.

1 Plaintiffs seek a temporary restraining order (“TRO”) to give “breathing space to participants
 2 and supporting entities until the judicial system produces an adjudication on the merits.” (Reply at 1-2.)
 3 Although the Court is not unsympathetic to providing “breathing space” to the parties (*see* Order Re:
 4 Briefing Schedule, filed Nov. 8, 2011), as it may benefit all concerned, this is not a sufficient reason
 5 under the law to issue a TRO. Outside of the confines of the law of preliminary injunctive relief, such
 6 breathing space could only be accomplished with Defendants’ consent, which they refused to give. (*See*
 7 Opp’n at 2.)

8 Preliminary injunctive relief is “an extraordinary remedy that may only be awarded upon a clear
 9 showing that the plaintiff is entitled to such relief.” *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S.
 10 7, 129 S. Ct. 365, 376 (2008). A party seeking injunctive relief under Federal Rule of Civil Procedure
 11 65 must show “that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in
 12 the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is
 13 in the public interest.” *Am. Trucking Ass’ns v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir.
 14 2009)(quoting *Winter*, 129 S. Ct. at 374). With respect to the showing a plaintiff must make regarding
 15 his chances of success on the merits, the Ninth Circuit applies a sliding scale approach. *See Alliance*
 16 *for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). Under the sliding scale approach, the
 17 elements of the preliminary injunction test are balanced and, where a plaintiff can make a stronger
 18 showing of one element, it may offset a weaker showing of another. *Id.* at 1131, 1134-35. “Therefore,
 19 ‘serious questions going to the merits’ and a hardship balance that tips sharply towards the plaintiff can
 20 support issuance of an injunction, so long as the plaintiff also shows a likelihood of irreparable injury
 21 and that the injunction is in the public interest.” *Id.* at 1134-35.

22 **Likelihood of Success on the Merits**

23 Plaintiffs first contend that Defendants are judicially estopped from prosecuting the dispensaries
 24 and their landlords under the CSA. Judicial estoppel is an equitable doctrine which “generally prevents
 25 a party from prevailing in one phase of a case on an argument and then relying on a contradictory
 26 argument to prevail in another phase.” *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001).

27 Plaintiffs point to Defendants’ representations made during proceedings in *County of Santa Cruz*
 28 *v. Holder*, U.S. District Court of the Northern District of California, case no. 03cv1802 (the “Santa Cruz

1 Action"). Plaintiffs in the Santa Cruz Action raised largely the same legal issues as do Plaintiffs herein
 2 in opposition to federal enforcement of the CSA against medical marijuana dispensaries operating under
 3 the Compassionate Use Act. After a publicly-announced change in federal enforcement policy of the
 4 CSA in the states authorizing medical use of marijuana, the parties stipulated to dismiss the action. (Pls'
 5 Request for Judicial Notice Ex. 2, 3 & 5.) Under the new policy ("Medical Marijuana Guidance"), as
 6 a general matter, federal resources would not be focused on enforcing the CSA in the states which
 7 enacted laws authorizing the medical use of marijuana against individuals who were in clear and
 8 unambiguous compliance with state law. (*Id.* Ex. 3.) Plaintiffs in this action argue that Defendants
 9 should be judicially estopped from resuming CSA enforcement in California.

10 In considering whether to apply the equitable doctrine in a particular case, three factors may
 11 inform the decision:

12 First, a party's later position must be "clearly inconsistent" with its earlier position.
 13 Second, courts regularly inquire whether the party has succeeded in persuading a court
 14 to accept that party's earlier position, so that judicial acceptance of an inconsistent
 15 position in a later proceeding would create the perception that either the first or the
 16 second court was misled. Absent success in a prior proceeding, a party's later
 inconsistent position introduces no risk of inconsistent court determinations, and thus
 poses little threat to judicial integrity. A third consideration is whether the party seeking
 to assert an inconsistent position would derive an unfair advantage or impose an unfair
 detriment on the opposing party if not estopped.

17 *New Hampshire*, 532 U.S. at 750-51 (internal quotation marks and citations omitted). These factors are
 18 not present here.

19 Prior to the dismissal of the Santa Cruz Action, Defendants argued the new policy rendered the
 20 case moot. (Pls' Request for Judicial Notice Ex. 5.) The plaintiffs disputed this based on the voluntary
 21 cessation doctrine. (*Id.*) The court was aware of the parties' contrary positions, which were based on
 22 the prospect that the federal enforcement policy could change. (*Id.*) However, rather than to resolve
 23 the mootness and voluntary cessation issues, the parties wanted to dismiss the case and entered into a
 24 Joint Stipulation of Dismissal Without Prejudice ("Stipulation") based on a shared understanding the
 25 enforcement policy could change in the future. Accordingly, the Stipulation provided: "If Defendants
 26 withdraw, modify or cease to follow the Medical Marijuana Guidance, the case may be reinstituted in
 27 its present posture on any Plaintiffs' motion . . ." (*Id.* Ex. 2.) Based on these facts it does not appear
 28 that the Court in the Santa Cruz Action was misled, that Defendants' current actions are clearly

1 inconsistent with its representations in the Santa Cruz Action, or that Defendants would derive an unfair
 2 advantage by resuming enforcement. Plaintiffs therefore have not shown a likelihood of success on the
 3 merits of the equitable estoppel claim.

4 Plaintiffs next contend that federal prosecution of dispensaries which comply with the
 5 Compassionate Use Act would violate the Fifth and Ninth Amendments of the United States
 6 Constitution. This argument was raised and rejected in *Raich v. Gonzalez*, 500 F.3d 850 (9th Cir. 2007)
 7 (“*Raich II*”). *Raich II* addressed the question “whether the liberty interest specially protected by the
 8 Due Process Clause embraces a right to make a life-shaping decision on a physician's advice to use
 9 medical marijuana to preserve bodily integrity, avoid intolerable pain, and preserve life, when all other
 10 prescribed medications and remedies have failed,” and concluded that “federal law does not recognize
 11 a fundamental right to use medical marijuana prescribed by a licensed physician to alleviate excruciating
 12 pain and human suffering.” 500 F.3d at 864, 866 (footnote omitted).

13 Plaintiffs argue that they can show a probability of success on this issue because times have
 14 changed since *Raich II*. The Due Process Clause protects “those fundamental rights and liberties which
 15 are, objectively, ‘deeply rooted in this Nation's history and tradition,’ and ‘implicit in the concept of
 16 ordered liberty,’ such that ‘neither liberty nor justice would exist if they were sacrificed.’” *Reich II*, 500
 17 F.3d at 862, quoting *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). In *Reich II*, the Court
 18 found, based on an extensive review of medical marijuana use practice and its prosecution, that “[f]or
 19 the time being, this issue remains in the arena of public debate and legislative action.” *Id.* at 866
 20 (internal quotation marks and citations omitted). Plaintiffs contend that at the time of *Reich II* only
 21 eleven states had passed laws decriminalizing medical marijuana use, *id.* at 865, but “now 23 states
 22 [have] authorized [medical marijuana] use, or have pending legislation authorizing such use, with a
 23 combined population of about 53% of the people in this country.” (Pls’ Mem. of P. & A. at 22.) The
 24 Court is not persuaded. Taking Plaintiffs’ assertions regarding the acceptance of medical marijuana use
 25 at face value,¹ the 53% approval suggests that the issue of medical marijuana use has not left “the arena

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 28 ¹ The Court notes that Plaintiffs included the states which have legislation pending. It is doubtful
 that *Reich II* supports this notion. See 500 F.3d at 866 & n.15.

1 of public debate and legislative action.” *Raich II*, 500 F.3d at 866. Plaintiffs have therefore not shown
2 the probability of success on the merits of their Fifth and Ninth Amendment claims.

3 Plaintiffs also argue that the CSA exceeds the commerce powers given to Congress by the United
4 States Constitution and that its enforcement would violate the Tenth Amendment. This argument too,
5 has been raised and rejected in binding precedent. “Congress acted within the bounds of its Commerce
6 Clause authority when it criminalized the purely intrastate manufacture, distribution, or possession of
7 marijuana in the Controlled Substances Act.” *Reich II*, 500 F.3d at 867 (summarizing the holding of
8 *Raich I*). “Generally speaking, . . . power granted to Congress trumps a competing claim based on a
9 state's police powers. ‘The Court long ago rejected the suggestion that Congress invades areas reserved
10 to the States by the Tenth Amendment simply because it exercises its authority under the Commerce
11 Clause in a manner that displaces the States' exercise of their police powers.’” *Reich II*, 500 F.3d at 867,
12 quoting *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 291 (1981). Accordingly,
13 after *Reich I*, Plaintiffs could not state a claim either for exceeding the powers under the Commerce
14 Clause or violating the Tenth Amendment. *See Reich II*, 500 F.3d at 867.

15 Finally, Plaintiffs contend that their due process rights were violated because Defendants intend
16 to engage in selective prosecution. This is based on the assertion that like California, the state of
17 Colorado has decriminalized medical marijuana use, but the Department of Justice is not enforcing the
18 CSA against dispensaries in Colorado, only in California. Although the prosecutor’s discretion whom
19 to prosecute is broad, “[s]electivity in the enforcement of criminal laws is . . . subject to constitutional
20 constraints. In particular, the decision to prosecute may not be deliberately based upon an unjustifiable
21 standard such as race, religion, or other arbitrary classification.” *Wayte v. United States*, 470 U.S. 598,
22 608 (1985) (internal quotation marks and citations omitted). “The requirements for a
23 selective-prosecution claim draw on ordinary equal protection standards. The claimant must
24 demonstrate that the federal prosecutorial policy had a discriminatory effect and that it was motivated
25 by a discriminatory purpose.” *United States v. Armstrong*, 517 U.S. 456, 465 (1996).

26 A number of legitimate factors are relevant to the exercise of prosecutorial discretion such as
27 “the strength of the case, the prosecution's general deterrence value, the Government's enforcement
28 priorities, and the case's relationship to the Government's overall enforcement plan.” *Wayte*, 470 U.S.

1 at 607. Defendants argue that such factors are relevant here. For example, California is the largest
 2 marijuana producer in the United States and therefore enforcement in California may have a greater
 3 deterrent effect on others. On the other hand, Plaintiffs have not shown that Defendants had an
 4 improper or irrational motive in sending formal notifications to dispensaries in California but not in
 5 Colorado. Indeed, if Plaintiffs' arguments were credited, it could lead to the untenable result that before
 6 any United States Attorney's Office may initiate enforcement action in one state, the Department of
 7 Justice would have to ensure that enforcement actions are initiated in other states as well to avoid
 8 selective prosecution claims. Because this would eviscerate prosecutorial discretion, Plaintiffs have not
 9 shown a likelihood of success on the merits of their selective prosecution claim.

10 **Likelihood of Suffering Irreparable Harm and Public Interest**

11 To the extent Plaintiffs rely on showing the likelihood of suffering irreparable harm based on
 12 the likelihood of success on the merits of any of their constitutional claims, *see, e.g., Elrod v. Burns*, 427
 13 U.S. 347, 373 (1976), this is unavailing for the reasons stated above. Plaintiffs also contend that being
 14 deprived of access to marijuana as prescribed by their doctors, they will suffer severe harm, including
 15 pain, nausea and lack of appetite leading to excessive weight loss.

16 However, even if Plaintiffs were able to establish medical necessity for marijuana use, and the
 17 Court assumes, without deciding, that they can, the law does not permit it to use medical necessity as
 18 a basis for enjoining enforcement of the CSA. The CSA "reflects a determination that marijuana has
 19 no medical benefits worthy of exception" for medical use. *Oakland Cannabis Buyers Cooperative*, 532
 20 U.S. at 491. Accordingly, "medical necessity is not a defense to . . . distributing marijuana . . . even
 21 when the patient is seriously ill and lacks alternative avenues of relief." *Id.* at 494 & n.7 (footnote
 22 omitted). Although federal courts have discretion in fashioning injunctive relief, *id.* at 495-96, this does
 23 not suggest they can consider any and all factors that might relate to the public interest or the medical
 24 needs of the parties, *id.* at 497. Specifically, the Court "cannot ignore the judgment of Congress
 25 deliberately expressed in legislation." *Id.* at 497 (internal quotation marks and citations omitted). In
 26 exercising its discretion when, as here, the Congress has deliberately struck a balance between
 27 controlled substances with medical use exceptions and those without, "the choice is simply whether a
 28 particular means of enforcing the statute should be chosen over another permissible means; the[] choice

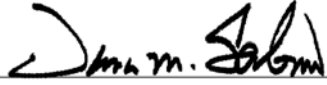
1 is not whether enforcement is preferable to no enforcement at all.” *Id.* at 487-98. Consequently, the
2 Court “may not consider the advantages and disadvantages of nonenforcement of the statute,” but only
3 the advantages and disadvantages of various means of enforcement. *Id.* at 498.

4 This Court is sympathetic to the plight of the individuals who must rely on medical use of
5 marijuana to relieve pain and suffering. However, based on the present state of the law discussed above,
6 Plaintiffs have not met their burden of showing that they are likely to succeed on the merits, that there
7 are “serious questions going to the merits,” likelihood of the type of irreparable injury the Court may
8 consider, or that issuing the requested TRO would be in the public interest. *See Alliance for Wild*
9 *Rockies*, 632 F.3d at 1134-35. Accordingly, Plaintiffs’ application for a temporary restraining order is
10 **DENIED.**

11 A hearing on Plaintiffs’ motion for preliminary injunction will be held on **December 2, 2011**
12 **at 1:30 p.m.** in Courtroom 10, located at 940 Front Street in San Diego California. In light of the
13 parties’ exhaustive briefing so far, no further briefing will be accepted, except that no later than noon
14 on **November 28, 2011** each side may file a memorandum of points and authorities no more than seven
15 pages in length, and supporting evidence, regarding Plaintiff’s claims (1) that availability of marijuana
16 for medical purposes as provided by the Compassionate Use Act has in recent years become a protected
17 right under the Fifth and Ninth Amendments, and (2) that Defendants are engaging in selective
18 prosecution.

19 **IT IS SO ORDERED.**

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21 DATED: November 18, 2011

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24 HON. DANA M. SABRAW
25 United States District Judge
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